

AGREEMENT TO ESTABLISH AN IN-LIEU-FEE AQUATIC RESOURCE MITIGATION PROGRAM FOR THE STATE OF MONTANA

**FINAL DRAFT
Revised November 2003**

1. INTRODUCTION

This document (the Agreement) establishes an in-lieu-fee (ILF) mitigation agreement between the Montana Department of Fish, Wildlife and Parks (FWP), Omaha District of the U.S. Army Corps of Engineers (Corps), and the Montana Department of Environmental Quality (DEQ). This Agreement establishes a mechanism to compensate for losses or impacts to wetland and stream resources (aquatic resources) throughout Montana. FWP has established the Montana Wetlands Legacy (Legacy), managed by the Legacy Coordinator, to encourage and facilitate voluntary protection of Montana's aquatic resources. The Legacy Coordinator will cooperate with the other above named parties to establish and manage an ILF mitigation program for Montana which becomes effective as of the last date set forth on the attached signature page. The Legacy Coordinator will assume the duties of ILF Administrator at that time. The ILF Administrator will establish the Montana Wetlands Legacy Trust Fund (Legacy Trust) for receipt and disbursement of collected fees.

2. BACKGROUND AND PURPOSE

The FWP coordinates the Montana Wetlands Legacy as a voluntary, incentive based partnership comprised of both private and public partners working to protect Montana's aquatic resources and associated uplands. The Legacy's mission is to create a wetlands legacy for Montana by protecting, restoring, and enhancing Montana's aquatic resources through a fully integrated partnership. In addition to supporting existing partners' aquatic resource protection efforts, the Legacy reaches out to new partners and offers tools and resources to everyone interested in protecting aquatic resources throughout Montana. The Legacy works with private, local, state, tribal and federal organizations and agencies to conduct such conservation activities.

The Legacy has completed over 135 projects since its inception in May 2000. These projects, which include wetland restoration, creation, and enhancement, as well as conservation easements, have protected over 30,000 acres of wetlands and associated uplands in Montana. Legacy partners are staffed to identify potential projects, implement and construct them, and to monitor wetlands post-construction. In addition, Legacy organizations are staffed to implement permanent legal protection of project sites through fee and easement acquisition and easement defense.

The purpose of this Agreement is to establish an additional voluntary mechanism to compensate for aquatic resource impacts and losses resulting from regulated activities in

Montana and to provide greater flexibility for project mitigation to permittees. Projects developed by the ILF Administrator will be used to mitigate for Corps' Nationwide Permits, Regional General Permits, Letters of Permission, and Individual Permits (collectively "permits") as set forth in the Code of Federal Regulations (33 CFR Parts 320-331), and for other actions affecting aquatic resources governed by federal or state regulations, including Montana's Section 401 water quality certifications. Typically, the ILF option will be utilized primarily for projects authorized by general permit.

Permittees and other contributors to the Legacy Trust will be provided this option only after avoidance and minimization of project related and other impacts have been accomplished to the maximum extent practicable as required by Corps Regulations, EPA 404(b)(1) guidelines, the 2002 Mitigation Regulatory Guidance Letter (RGL 02-02), and the 1990 Corps/EPA Mitigation Memorandum of Agreement, or following formal resolution of enforcement and legal actions at the state or federal level. The Legacy Trust can be used when there is no practicable opportunity for on-site compensation, or when use of this Agreement is environmentally preferable to on-site compensation. Payment of an in-lieu-fee to satisfy compensatory mitigation requirements on Tribal Reservations in Montana shall be considered by the Corps on a case-by-case basis, in consultation with appropriate Tribal authorities.

This Agreement establishes procedures the signatories will follow in establishing and managing an ILF mitigation program in Montana. It also establishes the procedures the ILF Administrator will follow in proposing and developing project sites. Site-specific information, as described in Section IV of the November 7, 2000, Interagency ILF Guidance, will be provided for each project site developed under this Agreement. The goal of this Agreement is to establish, restore, enhance, and protect as many wetland, riparian, and aquatic acres and as many linear stream features as possible with the funds available.

The ILF Administrator will play no role in the Corps, DEQ, or other regulatory agency's decisions to approve or deny permits. Further, the ILF Administrator will have no role in decisions by the Corps or other agencies as to whether, how much or what type of compensation is a necessary condition of any permit approval or enforcement action resolution.

3. AUTHORITY

Agencies signing this Agreement do so based on the following roles, responsibilities, and legal authorities relative to the protection of aquatic resources of Montana:

U.S. Army Corps of Engineers: The Corps of Engineers administers a permit program for both the discharge of dredge and fill materials into waters and wetlands of the U.S. under Section 404 of the Clean Water Act and for activities in navigable waters of the U.S. under Section 10 of the Rivers and Harbors Act. Payment to an approved ILF program is one option for satisfying compensatory mitigation requirements of Corps permits. Payment to an ILF program may also be an option for settling some enforcement cases. The ILF option can only be used in enforcement cases involving an approved plan as part of an after-the-fact permit application or if approved by a Federal Court (typically as the result of a negotiated consent decree approved by the court). Fines and monetary penalties

established by the court to be paid by the violator (s) cannot be redirected into an ILF program.

For purposes of Section 10/404, compensatory mitigation is the establishment, restoration, enhancement or protection of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. All compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment. Also, all mitigation will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable (33 CFR 320.4(r)(2)).

As provided in the “Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits and Conditions” (61 Fed. Reg. 65922, 13 December 1996) contributions to wetland trust funds where such fees contribute to the restoration, creation, replacement, enhancement or preservation of wetlands may be acceptable as compensatory mitigation for wetland impacts authorized by nationwide and other minor permits. Federal interagency guidance on the use of ILF arrangements (65 Fed. Reg. 66914, 7 November 2000) elaborates on the discussion of use of ILF by outlining the circumstances where ILF may be used, consistent with existing regulations and policy, and recommends how formal agreements should be structured. General Condition #19 of the 2002 Corps reissuance of many nationwide permits (67 Fed. Reg. 2093, 15 January 2002) acknowledges the utility of ILF, includes stream and open water impacts as possibly requiring mitigation, and encourages approaching mitigation on a priority watershed basis.

Montana Department of Environmental Quality: Section 401 of the Clean Water Act gives Montana and other states the authority to affect the issuance of federal permits or licenses for activities over which they do not have primacy. In Montana, these include Section 404 permits issued by the Corps for any construction in "waters of the U.S." including wetlands and for hydropower licenses issued by the Federal Energy Regulatory Commission (FERC). Section 401 specifically requires all applicants for these federal permits to obtain from the state a certification that the project is acceptable and will not violate state water quality standards. The State can approve, deny or waive certification on any project and its decision is binding upon the federal permitting agency. An approved certification is a positive statement that the project is acceptable and will not violate water quality standards or any appropriate requirement of state water policy or law. Typically, certifications contain conditions under which the project is approved. Any condition imposed by a certification automatically becomes a condition on the federal permit and is enforceable by the DEQ.

4. PROGRAM OPERATION AND ADMINISTRATION

Funds shall be used solely for activities directly related to physical aquatic habitat and resource establishment, restoration, enhancement, and protection to include the following: land acquisition, purchase of permanent easements, purchase of water rights, in-stream flow leasing, development of mitigation and monitoring plans, permit fees, implementation of physical mitigation and monitoring, administrative costs, and long-term management of mitigation parcels.

The FWP will maintain the position of Coordinator of the Montana Wetlands Legacy within FWP, provide office space, computer and clerical support, and provide other administrative support normally provided to its permanent employees. In addition, FWP will provide \$20,000 annually for the Coordinator to defray operational expenses for coordination of the Montana Wetlands Legacy, including this ILF mitigation program. These funds will be matched with other state, federal, and private funds, which in total, will be used to defray the Coordinator's salary and other operational costs for coordination of the Legacy. FWP will request Legislative authority to expend these funds, which will be kept separate and apart from fees made available to the Legacy by virtue of implementation of the ILF mitigation program outlined in this agreement

The ILF Administrator shall receive, at the time funds are deposited with the Legacy Trust, an overhead reimbursement equal to 15% of the funds. The overhead reimbursement is to be used for day-to-day management of the ILF Program and the Legacy Trust, and for personal services expenses incurred while carrying out the responsibilities of this Agreement. In addition, the ILF Administrator may use the overhead reimbursement for bookkeeping, mailing, printing, office costs and supplies, bank fees, training, travel, and staff time directly related to supporting these expenses and activities resulting from this Agreement. It is the intent of the parties to maximize the amount of funds that will be directly applied to the establishment, restoration, enhancement, and protection of high priority aquatic resources.

The ILF Administrator will have sole authority and responsibility for decisions related to the use of the overhead reimbursement funds once deposited with the Legacy Trust and reserves the right to reject any fee. In cases where fees are rejected no overhead reimbursement will be withdrawn from the fee by the ILF Administrator.

The ILF Administrator is responsible for obtaining all federal, state, tribal, and local permits required for implementation of projects carried out under this Agreement. All mitigation projects shall be designed to be self-sustaining in the long term to the maximum extent feasible.

Pursuant to the general criteria identified herein, the ILF Administrator shall:

- a. Through the FWP and pursuant to this Agreement establish a restricted account (Legacy Trust) to handle and manage all fees received from permittees and other entities.**
- b. Identify aquatic resource conservation projects that serve the purposes of this Agreement and develop these projects through an ILF Committee (see Section 10) and in conjunction with other Legacy partners, including land management agencies, land trusts, environmental conservation organizations, and others.**
- c. Strive to leverage Legacy Trust funds by soliciting appropriate matching contributions from other sources, thereby building partnerships and adding value to the work accomplished under this Agreement.**
- d. Provide accounting for expenditures per the requirements of the funding sponsors of the Legacy Trust, and to the general public as appropriate.**

- e. Make disbursements of funds from the Legacy Trust pursuant to the requirements of this Agreement.
- f. Enter into agreements and contracts with project sponsors, co-sponsors, and contractors as deemed necessary to implement aquatic resource conservation projects pursuant to this Agreement.
- g. Report at least semi-annually to the ILF Committee on the Legacy Trust balance and expenditures, and provide a short description of the status of each active project identified for which mitigation or other fees are being or will be committed.
- h. Take responsibility for any remedial actions or additional work necessary should initial attempts fail to adequately compensate for permitted impacts to aquatic resources, per agreed upon performance standards.

The agency directing fees or fines to the Legacy Trust retains full authority to approve or deny the expenditures of ILF project funds for which they are responsible and to approve or deny proposed project sites and mitigation plans (see Part 5a-j below).

5. SITE SELECTION AND CRITERIA

Projects developed under this Agreement are intended primarily to provide in-lieu-fee mitigation for ecological impacts to aquatic resources which occur as a result of work conducted in compliance with a Corps Section 10/404 permit and/or Montana Section 401 water quality certification, or mitigation required due to unauthorized activities or permit conditions that were not satisfied. Consistent with the goals of the Clean Water Act, the focus will be to restore and maintain the chemical, physical, and biological integrity of the nation's waters. Specifically, emphasis will be on the establishment, restoration, enhancement, and protection of aquatic habitats and resources.

Habitat-based projects developed and selected for funding under this Agreement shall:

- Be located within the State of Montana.
- Be located within the same watershed of the activity which is the source of funds for the Account (see Part 7 below).
- Provide, to the extent appropriate, the replacement of amount, type, and function of aquatic resources authorized to be impacted by a permit or by an infraction of state or federal regulations. The permitting agency will determine the amount of compensatory mitigation required to offset permitted and unauthorized impacts to aquatic resources. In-kind replacement may be required when the impacted resource is locally important. Functions of wetlands impacted will be assessed when appropriate through the Montana Department of Transportation (MDT) Montana Wetlands Assessment Method (May 25, 1999 version), the Hydrogeomorphic Functional Assessment method, or other appropriate assessment methodology. The Corps will use the Wetland Mitigation Ratios and Stream Mitigation Guidelines, incorporated into this document by reference, to determine the function, type and amount of compensatory mitigation required to offset permitted impacts to aquatic

resources. In every case, the ILF Administrator will be informed of the amount, type, and function of aquatic resource replacement that will be required from a fee deposited in the Legacy Trust before a permit is issued, or enforcement action settled. As stated in Part 4 above, the ILF Administrator reserves the right to refuse for any reason, any fee proposed to be deposited in the Legacy Trust.

- Have provisions for the ILF Administrator to secure and ensure permanent management and stewardship by a responsible state agency, federal agency, conservation organization, or other appropriate entity.

In addition to drawing from the knowledge of FWP staff, the ILF Administrator will consult with members of the ILF Committee and others knowledgeable in the field to identify potential aquatic resource compensation sites. Project proposals for each site will be developed that include, but are not limited to, the following:

- a. Location, size, baseline condition (extent and inventory of existing wetlands and aquatic resources), site history, and type of aquatic resource compensation to be provided.
- b. Goals and objectives of the mitigation plan and schedule for conducting the activity that will provide compensatory mitigation. The mitigation plan will specify which mitigation obligations are being applied to a given project.
- c. Site selection criteria, to include practicability considerations for successful project establishment and watershed priority needs.
- d. Mitigation work plan, to include:
 - 1) boundaries of proposed treatment, including buffers
 - 2) construction methods, timing and sequence
 - 3) source of water supply and connectivity to other aquatic resources
 - 4) topographical/microtopographical requirements related to hydrology and vegetation establishment
 - 5) planting schedule
 - 6) any reliance on natural revegetation
 - 7) weed control
 - 8) erosion control
 - 9) management considerations (temporary fencing, mulching, etc.)
- e. Estimated cost to accomplish the proposed work, including administrative expenses.
- f. Performance standards adequate to determine if the project is meeting prescribed goals.
- g. Reporting protocols and monitoring plan.
- h. Long term protection plan to include:
 - 1) financial and/or legal protections (easements and water rights, etc.)
 - 2) responsibility for remedial actions necessary to successfully establish the site
 - 3) site management/maintenance

i. All local, state, and federal permits or other authorizations required for the project and acknowledgement of responsibilities to obtain the same.

j. Qualifications of any project sponsor other than the ILF Administrator and proposed allocation of funding responsibility.

6. TIME FRAMES

The ILF Administrator will allocate funds to specific compensation projects at such time as there are adequate funds to meet all costs necessary to complete a project that will meet or exceed the mitigation requirements that generated the fees. Only the ILF Administrator can expend funds and that decision will be made at its sole and absolute discretion, in accordance with the ILF Administrator's policies and procedures (and see Section 4).

The ILF Administrator is committed to developing projects, where possible, to provide compensatory mitigation for wetland impacts in advance of loss of those wetlands. However, due to initial funding limitations, during the first year of this Agreement the ILF Administrator will initiate projects and expend funds within 3 years of the date of receipt of payment. During the second year, projects will be initiated within 2 years of receipt of payment. Beginning with the third year, and continuing through the life of the Legacy Trust, projects will be initiated within one year of receipt of payment. For purposes of this agreement, the term "initiate" shall mean that a site has been identified with protection secured, and a contract has been issued for the development and implementation of the mitigation project. A construction completion date, not to exceed two years from the date of contract issuance shall be required for each project.

In exceptional circumstances, and with approval of the ILF Committee, the ILF Administrator shall be allowed to deviate from these time frames for reasons including inadequate funds, funds slow to accumulate, or lack of suitable projects within a watershed where fees or fines are generated. If fund accumulation in a given watershed is inadequate for timely implementation of projects, monies can be transferred to another watershed upon the approval of the fee-generating agency.

7. WATERSHED PLANNING

The 16 Major Montana Watershed Basins (based on hydrologic unit boundaries) currently utilized by the MDT and others for mitigation and watershed planning purposes will be used to focus expenditure of funds in the same watershed as the impact that generated the funds. Project recommendations will be based on priority watershed needs as determined by the ILF Committee. The ILF Committee must review and recommend on a case-by-case basis any expenditure of funds outside the watershed in which said funds were generated.

8. FEES

Determination of the appropriate fees to meet compensatory mitigation requirements will be made by the ILF Administrator, working cooperatively with the ILF Committee, using the Wetland Mitigation Ratios and the Stream Mitigation Guidelines. Upon receipt of the

appropriate fee from the permittee for compensatory mitigation, the ILF Administrator will assume the responsibility of mitigation planning, implementation, monitoring, and long-term maintenance and management. Acceptance of a mitigation fee or other funds by the ILF Administrator is an acknowledgement by the Legacy that it and not the contributing party is responsible for satisfying the mitigation requirements of the Section 10 or Section 404 permit, Section 401 Certification, or settled enforcement action.

The initial fee structure for in lieu fee projects will be established using costs incurred in recent years by private wetland and riparian restoration firms and agency and conservation organization programs. The wetland mitigation project fee structure will be based on a per acre basis to include all costs of planning, design, and construction, and costs for acquisition or permanent protection of the site through easements. Administrative and legal costs for implementing wetland projects including obtaining necessary permits and clearances, oversight of contractors doing the work on the ground, and the Administrator's overhead to cover salaries and benefits will be included in this per acre fee. The fee structure for linear system projects will also be based on the above but will be categorized by practice; e.g. riparian buffer enhancement and stream restoration. Fees for projects involving more than one practice will be the sum of each practice cost. In the event that the fee structure is insufficient to maintain the program and the ILF Administrator can demonstrate that actual costs exceed fees collected during an appropriate reporting period, fees will be adjusted upward until they bring fees and costs into balance. In the event that fees result in overcharges in terms of costs for a similar period of reporting, fees will be reduced to bring them into balance with costs.

9. ACCOUNTING

The ILF Administrator agrees to receive and expend fees and other funds in the manner and with the limitations described in this Agreement. Said funds will be delivered to the Legacy Trust by check or money order, be held by the ILF Administrator, and be used to establish, restore, enhance, and protect aquatic habitats and resources as described herein. Upon receipt of funds, the ILF Administrator will notify the appropriate agency with a written record of funds received, including the date received, source of the funds (with both individual/corporate name and the Corps/EPA/DEQ/other agency permit/file number) and the amount received. Funds will also be accounted for by agency, watershed, and acreage or linear feet of aquatic type, whichever is appropriate.

The ILF Administrator and the Legacy Trust shall hold any funds collected pursuant to this Agreement in a separate interest bearing account in an insured investment instrument or banking institution so as to earn interest while maximizing the safety and preservation of the principal in the Fund. The Legacy Trust shall account for the funds in accordance with generally accepted accounting principles. The Legacy Trust, with reasonable notice, shall be subject to audit when requested by the Corps or other signatories to this Agreement.

The Corps will publish an annual public notice providing an accounting of receipt and expenditures of ILF funds.

10. IN-LIEU-FEE COMMITTEE

With implementation of this Agreement, the signatory agencies will each appoint a representative(s) to serve on an ILF Committee to be chaired by the ILF Administrator. In addition, the Committee may also include representatives of the following entities:

Montana Department of Natural Resources and Conservation
Montana Department of Transportation
U.S. Fish and Wildlife Service
U.S. Bureau of Land Management
U.S. Bureau of Reclamation
U.S. Forest Service
Natural Resources Conservation Service
Federal Highway Administration
Fort Peck Tribes
Confederated Salish-Kootenai Tribes

The ILF Administrator will invite and encourage participation in ILF Committee meetings by habitat restoration oriented non-profit organizations. The purpose of the ILF Committee, to meet semi-annually at a minimum, includes review of planned and implemented mitigation projects and the proposed expenditure of funds, and to provide recommendations and guidance to the ILF Administrator concerning potential mitigation sites and program implementation. The Committee will strive for consensus among members present at meetings considering a particular question. The ILF Administrator shall ensure that at least a quorum (at least one-half) of Committee members is present for each meeting, and will maintain and distribute meeting minutes.

Two weeks prior to each meeting, the Committee will be provided an accounting reflecting at a minimum the Legacy Trust account balance (by agency, watershed, and aquatic type), account principal, interest accrued, a cumulative accounting summary of all Legacy Trust account activity (income vs. expenses), and project implementation to date, expenditures on a project by project basis, and a short description of the status of each active project for which mitigation or other fees are being or will be committed. The Committee will ensure that projects funded by the Legacy Trust adequately compensate for the impacts for which contributions were made to the Legacy Trust.

11. PROTECTION OF MITIGATION SITES

The ILF Administrator will ensure that all sites that are used to satisfy compensatory mitigation requirements are permanently protected, whether publicly owned or not. With approval by the Corps or other signatory agencies directing funds to a specific project, the ILF Administrator may transfer or have transferred interest in land or management responsibility for mitigation sites to appropriate state or federal agencies, non-profit conservation groups, local governments, land trusts and the like. In all cases, the ILF Administrator will procure appropriate agreements to ensure that both publicly owned and other properties are protected in perpetuity as viable aquatic habitats and resources serving the functions and values required by the applicable laws and regulations which resulted in the funds being made available.

12. GOOD FAITH

The parties agree that all will exercise their rights and obligations contained in this Agreement in good faith. The parties also agree that it is their desire to facilitate the process set forth in this Agreement by open and timely communication and cooperation.

13. AMENDMENT AND TERMINATION

This Agreement may be terminated by any signatory agency by giving ninety (90) days written notice to the other parties, as well as to the ILF Committee. Amendments, but not termination, require written approval by the signatories. Within 60 days of the issuance of a written notice of termination, the parties to this Agreement shall meet to discuss the reasons for the notice and any actions that may address the concerns leading a party to seek termination of this Agreement.

Prior to termination, the ILF Administrator shall provide an accounting of in-lieu-fees and other funds received and disbursed in satisfaction of compensatory mitigation requirements. Where feasible, all projects for which funding is available shall be completed prior to termination of this Agreement with perpetual protection insured, and a full accounting of accomplishments shall be made by the ILF Administrator. Any funds remaining following termination shall be disbursed by the ILF Administrator according to the desire of the agency requiring contribution of the fee, with assurances provided that compensatory mitigation ratios and requirements will be maintained.

14. FORCE MAJEURE

Nothing contained in this Agreement shall be construed to impose upon the parties any liability arising from circumstances beyond the parties' control, including unauthorized actions by third parties, natural disasters such as drought, fire, flood, storm, climate change, and earth movement, or from any prudent action taken in good faith by the parties under emergency conditions to prevent, abate, or mitigate significant injury to protected property resulting from such causes. The Corps shall make the final determination as to whether or not any corrective action by the ILF Administrator is required.

15. EXECUTION

This Agreement has been duly executed as of the last date shown below:

U.S. Army Corps of Engineers, Omaha District, District Engineer

By: _____

Date: _____

Montana Department of Fish, Wildlife and Parks, Director

By: _____

Date: _____

Montana Department of Environmental Quality, Director

By: _____

Date: _____

Montana Wetlands Legacy Trust Fund Administrator

By: _____

Date: _____